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No. 05-1508

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In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89
AND GALLUP-McKINLEY COUNTY PUBLIC
SCHOOL DISTRICT NO.1

Petitioners,

v.

UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONERS

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I. THE STATUTE UNAMBIGUOUSLY ESTABLISHES THE METHODOLOGY THE SECRETARY MUST USE IN REDUCING THE FIELD OF LEAS BEFORE APPLYING THE 25% DISPARITY TEST AND DOES NOT PERMIT THE SECRETARY'S EXTRA STEP OF ADJUSTING OR WEIGHTING LEA DATA BY STUDENT POPULATION

A. THE STATUTE UNAMBIGUOUSLY ANSWERS THE "PRECISE QUESTION AT ISSUE" UNDER *CHEVRON* STEP ONE, LEAVING NO ROOM FOR THE SECRETARY'S MODIFICATION

Under step one of the analysis required by *Chevron* this Court must decide "whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984).

The Federal Respondents admit that:

> The "precise question at issue" for purposes of *Chevron* step one, 467 U.S: at 842, is whether, when applying the 95th and 5th percentile exclusions set forth in the statute, 20 U.S.C. 7709(b)(2)(B)(i), the Secretary is required to eliminate 5% of the *LEAs* from each end of the spectrum of LEAs as ranked by per-pupil revenues, or instead may eliminate the outlying five percentiles of *pupils* as arrayed by per-pupil revenues.
>
> FRB 19[1]

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[1] Page references to the Federal Respondent's Brief will be shown as FRB [page number]. Page references to the State Respondent's Brief will be shown as SRB [page number].

The Federal Respondent also admits that the disparity comparison required by § 7709(b)(2)(A) is between LEAs in the State, not between individual pupils. FRB 20. Then, ignoring key text from § 7709(b)(2)(A) which informs the meaning of § 7709(b)(2)(B)(i), the Federal Respondent asserts that the "pivotal question" in this case is: "how to identify 'the 95th percentile' and 'the 5th percentile *of* * * * [*per-pupil] revenues in the State*," inserting the bracketed phrase "[*per-pupil*]" in place of the word "such" as appears in § 7709(b)(2)(B)(i). FRB 20. Examination of the full text of these provisions makes clear that the word "such" in the phrase "such expenditures or revenues in the State" as appears in § 7709(b)(2)(B)(i) refers back to the phrase "such per-pupil expenditures made by, or available to, the local educational agency in the State" as used in § 7709(b)(2)(A), rather than to *individual per-pupil* expenditures or revenues in the State.

Section 7709(b)(1) establishes the criterion for determining whether "a State may reduce State aid to a local educational agency" receiving Impact Aid funds as New Mexico has done. That criterion is whether "the State has in effect a program of State Aid that equalizes expenditures for the public education among local educational agencies in the State." (Emphasis added).

The statute then provides at § 7709(2)(A) that:

> . . . a program of State aid equalizes expenditures **among local educational agencies** if . . .**the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest *such per-pupil expenditures or revenues*** did not exceed **the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational**

> **agency in the State** with the lowest *such expenditures or revenues by* more than 25 percent. (Emphasis added).

Clearly the phrases "such per-pupil expenditures or revenues" and "such expenditures or revenues" as used in § 7709(b)(2)(A) both refer back to the more detailed phrase "the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agen[cies] in the State" as twice appears in that same sentence. That is the grammatical effect of the word "such" when used in these circumstances. Merriam-Webster's Collegiate Dictionary, 10th Ed. (Merriam-Webster, Inc. 2001), p. 1172, definition of "such" ("Such adj. . . 2. of the character, quality, or extent previously indicated or implied"). It simply allows the drafter to make a shorthand reference to a prior phrase without having to repeat the whole prior phrase. *United Airlines, Inc. v. C.A.B.*, 278 F.2d 446, 449 (D.C. Cir. 1960), *vacated on other grds., All American Airways, Inc. v. United Airlines, Inc.*, 364 U.S. 297 (1960) (reference to "such transportation" in § 401(d)(1) of the Federal Aviation Act of 1958 means the "transportation authorized by the certificate" as previously referenced); *Federal Trade Commission v. Bowman*, 248 F.2d 456, 457 (7th Cir. 1957) (reference to "such documentary evidence" in § 9 of F.T.C. Act means any documentary evidence "relating to any matter under investigation" as earlier referenced).

Substituting the prior definitional phrase for the later, shorter versions of that same phrase in § 7709(b)(2)(A), leaves no doubt whose "expenditures and revenues" Congress intended to be compared:

> . . . a program of State aid equalizes expenditures among local educational agencies if . . .*the amount of per-pupil expenditures made by, or per-pupil revenues*

> *available to, the local education agency in the State* with the highest [*such per-pupil expenditures made by or per-pupil revenues available to the local educational agen[cies] in the State*] did not exceed *the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State* with the lowest [*such per-pupil expenditures made by or per-pupil revenues available to the local educational agen[cies] in the State*] by more than 25 percent. (Italicized Inserts added).

The statute then tells us at § 7709(b)(2)(B)(i) that "[i]n making a determination under this subsection, the Secretary shall –

> (i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of *such expenditures or revenues in the State*." [Emphasis added].

Applying the same grammatical rules as noted above, makes clear that the phrase *"such expenditures or revenues in the State"* in § 7709(b)(2)(B)(i) is simply shorthand for "*such per-pupil expenditures made by or per-pupil revenues available to, the local educational agen[cies] in the State*" as that phrase is used in § 7709(b)(2)(A).

Reading the statute in this manner and concluding it is unambiguous as regards the "precise question" here at issue one simply implements the rule that when interpreting a statute "just as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. U.S.*, 508 U.S. 223, 233-234 (1993) (resort to holistic review to find meaning of statute does not mean statute was ambiguous).

Thus, it is clear from the text of § 7709 that the units required to be ranked, eliminated and measured under § 7709

are all LEAs in the State ranked on the basis of the per-pupil expenditures made by them or the per-pupil revenues available to them. The statute does not permit the Secretary to inject an extra step involving "weighting" of that LEA data by student population.[2] The statute contains no ambiguity on this point. The statute cannot permissibly be read to interpret the phrase "such expenditures or revenues in the State" in § 7709(b)(2)(B)(i) as referring to the revenues or expenditures of each of a State's students. (SRB 23-27, 35-41; FRB 21-26)

B. CONGRESS DID NOT AUTHORIZE USE OF A STUDENT POPULATION WEIGHTING FACTOR IN THE IMPACT AID EQUALIZATION FORMULA

The Federal Respondent's alternative argument (Br. at 29) that § 7709 should be read to permit a kind of student population based weighting adjustment – because the Congress expressly required such weighting in calculating an "equity" factor under another statute, the Education Finance Incentive Grant Program ("EFIG"), enacted in a different title to Pub. L. 103-382,[3] – is obviously wrong. The fact that the Congress expressly (and simultaneously) required weighting by student population in the EFIG formula and did not do so in § 7709 supports the opposite inference – that the Congress did not authorize use of student population based weighting adjustment in making the § 7709 calculation as added at step

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[2] As shown in Part II.B., *infra*, Respondents' alternative formulations of the Secretary's methodology (FRB 25 and n.8 and 34; SRB 26-41) which simply performs the required percentile exclusions on the basis of an array of all pupils attributing to each pupil the average expenditures/revenues of the LEAs they attend, fair no better under the statute.

[3] Section 6337(b)(3)(ii)(II) (Supp. III 2003) (and § 6336(b)(3)(B) from the 1994 Act) of the EFIG expressly requires that "the Secretary shall *weigh* the variation between per-pupil expenditures in each [LEA] . . . *according to the number of pupils served by the [LEA].*" (Emphasis added).

2 of the Secretary's formula. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987):

> The different emphasis of the two standards which is so clear on the face of the statute is significantly highlighted by the fact that the same Congress simultaneously drafted § 208(a) and amended § 243(h). In doing so, Congress chose to maintain the old standard in § 243(h), but to incorporate a different standard in § 208(a).

The EFIG equity formula is used to adjust how much EFIG grant money a district will be eligible to receive. The EFIG uses a totally different equity formula than applies to Impact Aid: "For each State, the Secretary shall compute a weighted coefficient of variation for the per-pupil expenditures of local education agencies in accordance with subclauses (II), (III) and (IV)." The EFIG specifies in great detail how to weight "[B]y number of children" each LEAs data to be used in that formula, by assigning different weights to certain pupils. *See*, § 6336 *et seq.* (as originally codified); *see*, §§ 6337(d)(1)(B)(iii), (d)(2)(B)(iii) and (d)(3)(B)(iii) as subsequently recodified. *Also see*, n.3, *supra*. None of those procedures apply to the Impact Aid equalization formula and the words "weighting," "number of children" or "student population" appear nowhere in § 7709. If the Congress had intended to allow or require comparable "weighting" adjustments using student population data in the Impact Aid equalization formula, it knew how to do this. *I.N.S. v. Cardoza-Fonseca, supra.*

C. REFERENCES IN THE EFIG STATUTE TO THE SECRETARY'S REGULATIONS DID NOT CHANGE THE IMPACT AID FORMULA

Respondents argue (FRB 29; SRB 28) that the 1994 EFIG statute's reference at 20 U.S.C. § 6336(b)(3)(B) (1994) to the

Secretary's old Impact Aid regulations (34 C.F.R. 222.63) – buried in the "Improving America's Schools Act" of 1994 (a 545 page bill) – shows that the Congress has "explicitly" endorsed the Secretary's formula as set out in an appendix to the 1976 Regulations (Pet. App. 97a).

Nothing in the statutory reference to this regulation and nothing in the legislative history called to the Congress' attention that the appendix to the Secretary's regulation contained a student population based weighting adjustment not present in § 8009 of the 1994 Impact Aid amendments (codified at § 7709). Moreover, § 6336(b)(3)(B) borrowed only the 25% disparity standard from the Secretary's regulations to use for EFIG purposes, not the Secretary's methodology as set out in the appendix. *Brown v. Gardner*, 513 U.S. 115, 120-122 (1994) (where record of Congressional discussion preceding reenactment of statute makes no reference to preexisting administrative interpretation and there is no other evidence to suggest that Congress was even aware of an administration's interpretive position the reenactment will not be considered an endorsement of the administrative interpretation); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction"); *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235, 241-242 (1964) (Congressional reenactment has no interpretive effect as endorsement of a regulation where regulation clearly contradicts requirements of controlling statute).

Nor did the later reenactment of this "Special Rule" for EFIG in Title I, §1125A of the No Child Left Behind Act, Pub. L. 107-110, in 2002 (20 U.S.C. §6337(b)(3)(B)), some eight years after § 7709 became law, change its meaning. Section 6337(b)(3)(B) does not mention – much less endorse–

the methodology set out in the appendix to the referenced regulation and that provision was buried in H.R. 1, a massive bill of some 670 pages. The body of the regulation (at 34 C.F.R., Part 222.162, Pet. App. 175a-176a) parrots the statute. The regulation does reference an appendix to the regulation, but again, nowhere was it called to the Congress' attention that the appendix added an extra student population based weighting adjustment to the § 7709 formula. Nor was this called to the Congress' attention anywhere in the legislative history. Hence, Respondents' "reenactment-equals-endorsement" argument should be rejected. *Brown v. Gardner, supra.* Another principle of statutory construction also warrants rejection of that argument. *Mackey v. Lanier Collection Agency and Service,* 486 U.S. 825, 839-840 (1998): ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

D. POLICY ARGUMENTS AND EXPERT OPINION DO NOT CHANGE THE STATUTE

Respondents also argue that calculating the disparity percentage by adopting an EFIG-like student population weighting step would be more in line with scholarly opinion "or accepted practice in the field" (FRB 34), pointing to the EFIG formula as the model which they surmise Congress had in mind for the Impact Aid equalization formula.[4] FRB 29

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[4] Significantly, as admitted at FRB 35, n.15, the 1994 EFIG statute Pub. L. 103-382, § 1125A(b)(3)(C), expressly authorized the Secretary "based on the advice of independent education finance scholars" to "revise each State's equity factor to reflect other need-based costs of [LEAs]" or "to incorporate other valid and accepted methods to achieve adequacy of educational opportunity that may not be reflected in the coefficient of variation method." This authority was not retained in the No Child Left Behind Act, 20 U.S.C. §6337(b)(3). In contrast, the 1994 Impact Aid statute, 20 U.S.C. § 7709, gave the Secretary no authority to revise the statutory equalization formula. This refutes Respondents' arguments for

Yet, the Secretary and a wide range of educational experts have levied serious criticism at both the EFIG formula and the Impact Aid equalization formula.[5] GAO Report - School Finance Options for Improving Measures of Effort and Equity in Title I, GAO/HEHS - 96-142 (August 1996) (www.gao.gov/archive/1996/he 96142.pdf).

Many of those experts suggested "that an equity measure would be better if it took into account a large portion of each State's school districts in determining the disparity [under the impact aid formula] in per pupil spending across the State, as the [coefficient of variation, a measure used in the EFIG formula] does." [Emphasis added]. *Id.* at p. 31. This answers Respondents' argument that Petitioners' reading of the statutory formula would unfairly skew the disparity test since it would eliminate fewer LEAs than under the Secretary's formula. FRB 11. Eliminating fewer LEAs provides a better measure of disparity.

II. THE SECRETARY'S FORMULA DOES NOT PASS MUSTER AS A REASONABLE INTERPRETATION OF THE STATUTE UNDER *CHEVRON* STEP TWO

Even if this Court moves to step two under *Chevron*, the Secretary's methodology does not rest upon a reasonable interpretation of the statute, for several reasons. First, as shown in Part I of this Reply, § 7709 cannot be read to permit

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express or implied Secretarial authority to change that formula. *I.N.S. v. Cardoza-Fonseca*, 480 U.S., *supra* at 432.

[5] At page 13 and Appendix VI the GAO sets out the Secretary's criticism that the EFIG formula (which had not yet been implemented in 1996) will "tend to redistribute Title I funds from many high poverty states and school districts" and will have a "devastating impact" on low income districts by diverting funds from the "states and school districts where the needs are greatest." Criticism of the Impact Aid formula appears at page 43.

the ranking and elimination of percentiles of LEAs based on the percentile elimination of pupils. Second, the Secretary was given no authority to tinker with or change the Impact Aid equalization formula. *See*, Pet. Merits Br. at Argument Section F; *see*, fn. 4, *supra*. Third, as shown in Part II.A., *infra*, Respondents' other policy arguments and conflicting rationales demonstrate that Respondents' interpretation deviates from the statute. Fourth, as shown in Part II.B., Respondents' new formulations rest on an interpretation which requires a calculation impossible to perform.

A. RESPONDENTS' OTHER POLICY ARGUMENTS AND CONFLICTING RATIONALES CANNOT SALVAGE THE SECRETARY'S FORMULA

Summarizing Respondents' positions, first the 1994 legislation is not ambiguous and the 1976 regulations are to be found within the language of the statute. But, because the statute does not actually contain the Secretary's formula, they must argue the statute is ambiguous. But, since the Secretary declared that the 1996 regulations were neither interpretive nor rule making, Respondents must return to their initial argument that the statute embodies the regulation. That failing, they argue the Secretary must have been requested by Congress to fill a (non-existent) legislative gap. Respondents' policy arguments and conflicting rationales cannot salvage the Secretary's formula.

1. The 1994 Statute Did Not Incorporate the 1976 Regulation. The State Respondent contends that the 1996 regulations were a "clarification" of the former 1976 regulations (SRB 43) which had been incorporated into the 1994 Act. SRB 2 and 31; FRB 36-37 This rests on their conjecture the Secretary wrote the whole Act and must have intended to incorporate his Regulation. FRB 6. That conjecture is belied by the fact that the Impact Aid portion of

the bill removed the Secretary's authority over the equalization formula.

Moreover, it is clear from 139 Cong. Rec. (October 4, 1993) at p. 23501 that the Congress intended by Section 8009 to make major changes to Impact Aid. The Senate bill analysis states:

> Section 8009. *State consideration of payments in providing State aid.* Proposed section 8009 of the ESEA would govern the relationship of Impact Aid payments to State programs, of aid to education, and would replace current section 5(d) of the Act with a more rational and understandable approach. [Emphasis added] *Id.* at 23502.

Congress intended to make a change, not rubber stamp the 1976 regulations; and, nothing in the statute authorizes the Secretary to add the extra step of eliminating percentiles of pupils in developing the final field of LEAs, as set out in the Appendix to the Secretary's regulations (Pet. App. 184a-185a). Presumably, if this was the Secretary's bill and he intended to achieve what Respondents suggest, the statute would have simply reproduced (or expressly incorporated) this step from the Secretary's Appendix into the statute. It is not there.

2. There is No Ambiguity. Respondents then contend that the 1994 legislation did not contain the 1976 regulations, but is ambiguous and was interpreted by the 1996 regulations. (SRB 4, 18, 19, 22; FRB 19-23, 26, 37). (this was the Secretary's position below, SRB at p. 18). Apparently, the Secretary did not recall that his predecessor enacted the 1996 regulations without public notice-and-comment, announcing pursuant to the APA, that he was not promulgating interpretive regulations (Petitioners' Merits Brief at 29 and 43).

3. Congress Left No "Gap." At SRB 23, the State Respondent then contends that the 1996 regulations fill a "gap" intentionally left by Congress in its 1994 legislation for the Secretary to fill. If the 1996 regulations were filling a "gap," these regulations were by definition not embodied in the 1994 legislation. Otherwise there would be no gap; and, filling a gap does not involve the resolution of an ambiguity. It involves fulfilling a Congressional request. *United States v. Mead,* 533 U.S. 218, 229 (2001); but, no such gap and no such request appear in the 1994 Act.

B. RESPONDENTS' ALTERNATIVE FORMULATIONS OF THE SECRETARY'S FORMULA ARE NOT TENABLE

The fourth reason the Secretary's methodology does not rest upon a reasonable interpretation of the statute is that Respondents' rationale would require using actual per-pupil expenditures or revenues – data they admit does not exist, and data which is not the same as the average per-pupil expenditures/revenues for LEAs called for in the statute. Hence, their interpretation attributes to the Congress an intent to enact a statutory formula that cannot be implemented! Statutory interpretations which lead to "patently absurd consequences," as here, must be rejected. *United States v. Brown,* 333 U.S. 18, 27 (1948) (Rejecting interpretation of statute which would lead to "patently absurd consequences.") The per-pupil revenue or expenditure data attributed to each LEA under the statute are just averages of those revenues and expenditures calculated by taking the total LEA expenditures or revenues for a given year divided by the number of pupils in that LEA.[6] The State Respondents expressly admit this:

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[6] 20 U.S.C. § 7713(2) specifies how to calculate average per-pupil expenditures or revenues for LEAs in order to determine the amount of "per-pupil expenditures made by" them or the "per-pupil revenues

> As set forth *supra* at 25, a per-pupil expenditure or revenue is an average number. It is not the amount actually spent on any given pupil, an amount which would be impossible to calculate in any meaningful way. [Emphasis added]. SRB 36.

Yet. Respondents assert that the Secretary's formula is just another way of running the required percentile exclusions using an array of all students in the State ranked by their individual expenditures/revenues instead of using an array of all LEAs in the State ranked by their expenditures/revenues. FRB 15, n.8; SRB 36-38, n.26. They claim (SRB 38 and n.27) that the Secretary's formula and an Excel percentile calculation using an array of all students in the State ranked in groups of average per-pupil expenditures made by or revenues available to the LEAs they attend (calling this the ranked list of per-pupil expenditures) produce the same answer. That is true, but two wrongs don't make a right. The dispositive point is that both produce a different answer than the statutory formula.

The State Respondent admits that the costs to educate a first grader and the costs to educate a senior are not the same, and this is true both within a given LEA and across LEAs SRB 16 Moreover, the statute at §§ 7709 and 7713(2) only permits the use of an LEA's average per-pupil expenditures or revenues to rank, eliminate and measure those LEAs. *See* n.6, *supra*.

Yet, the State Respondents' Excel version of the Secretary's formula assumes the contrary, simply taking the

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available to" them required by § 7709. Section 7713(2) provides: "The term 'average per-pupil expenditures' means – (A) the aggregate expenditures of all [LEAs] in the State; divided by (B) the total number of children in average daily attendance for whom such agencies provide free public education."

average per-pupil expenditures or revenues for the LEAs which each student attends and repeating that average as many times on the array of students as there are students attending that LEA. This is a nonsense calculation which only serves to illustrate how far from the statute the Secretary's formula has strayed. It also clearly ignores the statutory directive (§ 7709(2)(B)(i), acknowledged in the Secretary's Appendix at step 1(a)(i) (Pet. App. 184a) to array LEAs – not students – to make the percentile exclusion and disparity determinations.

C. ENFORCING THE STATUTE AS READ BY PETITIONERS WILL NOT DESTROY NEW MEXICO'S "EQUALIZED" SYSTEM

The State Respondent contends that Petitioners are bent on destroying New Mexico's "far reaching" equalized operational funding system. This is not so. (SRB 7)

(1) The Impact Aid statutes and regulations allow States to back out special funding. New Mexico has done this. Pet. App. at 214a, *et seq*. Even after this leveling procedure, the disparity between the top district, Mosquero, and the bottom district, Des Moines, is 244%. (Pet. App. at 210a) The disparity between Gallup, tenth from the bottom, and Los Alamos, third from the top, is 96%. The disparity between Roswell, which is ranked 35th from the bottom, and Los Alamos which is third from the top, is 89%.[7] The State has never explained why these disparities occur in a system they claim is equalized.

(2) The Secretary's formula is not preferable. Respondents argue that as a matter of policy the Secretary's

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[7] Roswell's student population and the student population of those LEAs ranked below Roswell comprise almost 50% of the State's student population.

formula is preferable to the statutory formula because eliminating percentiles of pupils focuses upon student population FRB 25; SRB 37-39; but, Impact Aid exists to fund federally impacted LEAs not State educational programs. Section 7709 creates only "a limited exception" to the rule barring States from considering Impact Aid payments" in disbursing State funding. 139 Cong. Rec., *supra* at p. 23502. A system which eliminates 26% of the LEAs from disparity considerations (per the Secretary's formula) is not a desirable policy.[8] *See*, Part I.D., *supra*.

Moreover, LEAs are independent governmental entities in charge of educating children within a distinct geographical area. These LEAs represent rural areas, reservations, villages, farming communities and metropolitan areas. Congress has declared that these units have their own special value. Congress made clear at § 7709 that LEAs are the units which must be used in eliminating the field of LEAs against which the disparity test is to be applied.

Finally, all of those policy arguments should be addressed to the Congress, not to this Court. *See*, Pet. Merits Brief at 46-47.

D. ENFORCING § 7709 WILL NOT GIVE PETITIONERS A WINDFALL AT THE EXPENSE OF NON-IMPACT AID DISTRICTS

Respondents contend that if the impacted LEAs retain their Impact Aid without offset in their State operational funding, they will receive a windfall. Impact Aid is not paid only because a federal presence interferes with an LEA's

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[8] Federal Respondent's argument (FRB 24) that a State could manipulate the number or composition of its LEAs to fool the disparity test is answered by 20 U.S.C. § 7713(9)(B), granting the Secretary authority to disregard LEAs not created for a "legitimate educational purpose."

taxing capability. (*See* Joint Stipulation ¶ 1 Pet. App. at 191a) The statute recognizes that there are special burdens relating in general to the education of Native American children and Indian reservation residents and have made this a matter of specific concern for funding purposes under Impact Aid. *See*, §§ 7701, 7701(2), 7703(a)(1) and (2).

Further, under 20 U.S.C. § 7713(4), maintenance of plant costs are among the permissible uses for § 7703 funds. Districts which have property wealth may raise such funds through taxation or bonding. (§§ 22-25-1 through 22-25-10, NMSA). Zuni's and Gallup's property bases are seriously compromised. This inequality is not accounted for in the State's "equalized" funding system.[9]

Respondents and the *Amici* Non-Impact Aid Districts from New Mexico ("*Amici* Districts") claim that if the Petitioners are successful, this will result in a reduction in operational funding to all of the LEAs. But, Impact Aid payments only amount to 2.6% of New Mexico's educational budget (Pet. App. at 234a-236a) and New Mexico as of October 23, 2006 has large untapped recurring reserves:

> Governor Bill Richardson today announced that a strong and growing economy, bolstered by broad-based job growth, will mean that an additional $576 million in recurring revenues will be available when the Legislature and the Governor put together the budget during the 2007 legislative session. In addition, $913 million is estimated to [be] available for capital outlay projects and other one-time expenditures, such as water infrastructure and economic development initiatives for local communities. An additional $142 million is estimated to be set aside for efforts to

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[9] New Mexico's capital improvement funding formula has been declared to be unconstitutional (Pet. App. 227a).

> modernize schools across the State. (*See*, www.governor.state.nm.us (Newsroom) (Press Releases) (10/23/06))

It is inconceivable that New Mexico would reduce funding to non-Impact Aid LEAs should Petitioners prevail particularly when annual Impact Aid of $50,000,000 is relatively small compared to the "extra" (recurring) money available to the State.

New Mexico can readily fund any reduction of State operational educational funding to the *Amici* Districts that may result from a finding New Mexico is not equalized; and, more importantly, New Mexico has the resources to truly equalize operational educational funding for all New Mexico LEAs and doing so would enable New Mexico to qualify as equalized under the statutory formula.

E. THE *AMICI* DISTRICTS' RETROACTIVITY ARGUMENT IS WRONG

The *Amici* Districts argue that it would be unfair and inequitable to "punish" their reliance on the Secretary's erroneous statutory interpretation; but, Petitioners have not sought to secure retroactive application of the 1994 statute to events occurring before its enactment. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (retroactive relief only occurs when relief impairs rights party possessed when he acted); and, when Petitioners timely challenged the Secretary's equalization determination for New Mexico for the 1999-2000 school year under 20 U.S.C. § 7711, they did not seek to invalidate that determination for any prior year. An order correcting the Secretary's determination for that year would not constitute retroactive relief. *Crete Education Association v. The School District of Crete*, 226 N.W. 2d 752 (Neb. 1975) (Lower Court's 1974 ruling on dispute involving 1972-1973 school year was not forbidden "retroactive" relief where

relief was granted for the 1972-1973 school year as pled in the complaint). Petitioners timely challenge to the Secretary's equalization determination for school year 1999-2000 is the only determination presently at issue before this Court. Petitioners similar challenges to the Secretary's equalization determinations for New Mexico for the ensuing years have been stayed pending the outcome of Petitioners challenge to the 1999-2000 determination.

F. THE *AMICI* DISTRICTS' ELEVENTH AMENDMENT ARGUMENT IS WRONG

The *Amici* Districts (tellingly, not the State Respondent) raise an Eleventh Amendment defense,[10] but Petitioners have not sought monetary relief in this proceeding against any party. If Petitioners prevail, the Secretary's decision will be reversed. What, if anything, occurs after that is for another court at another time.[11]

G. THE *AMICI* DISTRICTS' ESTOPPEL ARGUMENT IS WRONG

The *Amici* Districts' estoppel argument for salvaging the

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[10] Eleventh Amendment defenses are not available for school districts in New Mexico because they are not arms of the State. *Duke v. York*, 85 F.3d 649 (10th Cir. 1996); *Daddow v. Carlsbad Municipal School District*, 898 P.2d 1235 (N.M. 1995) *cert. den.*, 516 U.S. 1067.

[11] 20 U.S.C. § 7709(e)(1) and (2) already waive the State's Eleventh Amendment immunity and the State Respondent's voluntary-intervention also waived any such immunity. The State will also be bound under ordinary principles of *res judicata* by this Court's rulings on the issues here decided. *Clark v. Barnard*, 108 U.S. 436, 477 (1883) (State's voluntary intervention in federal proceeding to protect its interests constituted a waiver of Eleventh Amendment immunity)) *cited with approval in, Lapides v. Bd. Of Regents of Univ. System of Georgia*, 535 U.S. 613, 619-620 (2002); *see Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 223, n.5 (1998) (defining *res judicata's* two aspects: (1) claim preclusion and (2) issue preclusion).

Secretary's formula contends that they should be allowed (at the expense of Petitioners) to continue enjoying a financial windfall the Congress never intended them to receive.[12] Moreover, estoppel can never lie against the United States or a federal official to force the continued provision of federal benefits or favorable treatment which only result from a mistake in statutory interpretation to events occurring after the statute became law. *Automobile Club of Michigan v. Commissioner of Internal Revenue,* 353 U.S. 180, 184 (1957) (The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law." and no reliance interest can bar retroactive application of a correct statutory interpretation); *accord, Dixon v. United States,* 381 U.S. 68 (1965); *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380 (1947) (applying same rule to deny estoppel claim to federal crop insurance benefits); *Schweiker v. Hansen,* 450 U.S. 785, 788 (1981) (*per curiam*) (same as to claim for Social Security benefits). *Office of Personnel Management v. Richmond,* 496 U.S. 414, 419-425 (1990) (denying estoppel claim for federal retirement benefits); *Wisconsin v. Udall,* 306 F.2d 790, 793-795 (D.C. Cir. 1962), *cert. den.,* 371 U.S. 969 (1963) (Interior Secretary had authority and duty to stop disbursing federal funds to States under a 20 year old formula based on erroneous statutory interpretation, rejecting States' reliance argument).

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[12] The *Amici* Districts' estoppel argument is misplaced for another reason alone: estoppel can never be invoked against a party who has done no wrong. *Office of Personnel Management v. Richmond, supra* at 421-422 (noting that "affirmative misconduct" is the traditional trigger for invocation of estoppel)." But there is no allegation here - nor could there be - that Petitioners have engaged in any kind of misconduct.

H. THE *AMICI* DISTRICTS' ARGUMENT THAT CONCERN FOR POOR OR MINORITY STUDENTS IN NON-IMPACT AID DISTRICTS SHOULD DETER THIS COURT FROM ENFORCING THE STATUTE IS WRONG

The *Amici* Districts' further argument that some students in certain ethnic or racial groups (or poor students) in their districts will be harmed if Petitioners prevail is likewise unavailing. The Impact Aid equalization formula does not take account of the race or ethnic status or poverty status of students in the various State LEAs against which the statutory formula is to be applied. So, the adverse affect the *Amici* Districts suggest will or might result to non-Impact Aid districts educating those students if Petitioners prevail cannot alter the meaning of the statute nor excuse the Secretary's continued non-compliance with it.[13]

CONCLUSION

The Secretary's formula should be ruled inconsistent with the statute and New Mexico should be declared to not be "equalized" under the statutory formula for school year 1999-2000.

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[13] If these were relevant factors, Petitioner Zuni has the highest percentage of minority students of all NM LEAs (99.2% Native American and .2% Hispanic and Black combined, for a total of 99.4% minority) *see*, Ex. E. to Appendix 4 of the *Amici* Districts' Br., and also has the highest % of students in poverty of all NM LEAs (48.22%) *Id.* at Ex. C. Likewise, Petitioner Gallup-McKinley's school population is 81.7% Native American, 11% Hispanic, .4% Black and .6% Asian, for a total minority student population of 93.6%. *See*, Ex. E to Appendix 4 of the *Amici* Districts' Br. 37.11% of Gallup-McKinley students are impoverished. *Id.* at Ex. C. Thus, if adverse impact on NM LEAs having high percentages of minority students or impoverished students were relevant factors, those factors would weigh in favor of rather than against Petitioners' call for enforcement of the statute as written.

Respectfully submitted,

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